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No. 357

In the
Supreme Court of the United States

October Term, 1963

JOSEPH W. DICK et al., *Petitioners*

v.

ROBERT S. McNAMARA, Secretary of Defense, et al.,
Respondents

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AMICUS CURIAE

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Government Employees

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STATEMENT OF INTEREST

The American Federation of Government Employees appeared as Amicus Curiae in the United States Court of Appeals and desires to be heard in the same capacity before this Honorable Court.

This is in accordance with Rule 42 of the United States Supreme Court, the parties having consented in writing

The American Federation of Government Employees was originally chartered by the American Federation of Labor on August 18, 1932, and is currently affiliated with the American Federation of Labor-Congress of Industrial Organizations.

The Constitution of the American Federation of Government Employees provides that its number one objective is to promote the general welfare of civilian governmental employees. (Art. II, Section 1)

The Federation is composed of more than 900 lodges and has a membership in excess of 125,000. The Federation has lodges in each of the 50 states, and in the Panama Canal Zone, Guam, Iceland and Okinawa.

In furtherance of the "Objects and Methods" of this Federation, we are concerned with legislative processes concerning our Country and our members. We must also be concerned with the judicial process insofar as administrative procedures affecting Federal employees may deviate from the Acts of Congress to the extent that said Acts may lose their purpose and intent.

Our interest is accentuated by the constant and heavy decentralization and reorganization programs being administered by the Federal Government. Currently the Federal Aviation Agency is in the throes of transferring the functions of six hundred and ten people from Washington, D. C., to the field. The Department of Defense is constantly reorganizing, decentralizing, and transferring.

In view of our large and diversified membership, we are most concerned with preventing the development, in government employment, of a practice comparable to the runaway shop, whereby an organization could destroy a Union by moving to another city or another location and hiring an entire new complement of employees.

Our interest in this situation has been further heightened by Executive Order 10987 establishing appellate rights and

Executive Order 10988, which provides for exclusive bargaining units of Federal employees.

Conceivably, an employee organization's efforts in obtaining bargaining rights under this Order could be completely frustrated by eliminating a unit holding such bargaining rights through a transfer of functions if the decision of the United States Court of Appeals is not corrected.

Argument

For the reasons stated above, the Third proviso of Section 12 of the Veterans Preference Act which governs "transfer of function" is of vital, major and immediate concern to the Federation as well as to all Federal employees. It is of prime necessity that there be certainty in the interpretation and application of this proviso.

The Federation represents to this Court that there exists as of this moment only confusion and uncertainty as to the meaning of the proviso:

1) The Court of Appeals in this case would limit protection only to transfers of "authority, powers and duties" when "expressly authoriz[ed] by law" (Pet. 25). Thus transfer rights would exist only for infrequent and sporadic transfers resulting from the operation of statutorily approved Reorganization Plans. This leaves management free from restriction as to all reorganizations not requiring statutory sanction. The Federation finds no support for such a limitation in the history or language of the Veterans Preference Act.

2) The Civil Service Commission has in effect both its 1954 Departmental Circular (R. 142) and the Supplement of 1960 (R. 145). The Commission would recognize intra-agency transfers but only if from one "competitive area" to another. This Federation is disturbed by the "competitive area" concept because no such license can be drawn from the Act, and if such license is permitted to continue the principles of job security provided under Civil Service principles

will exist only at the whim of any Agency of the Federal Government. Furthermore, no one knows what a "competitive area" is. In practice it has been whatever an agency says it is. In some instances it has included multiple states (Army Ordinance, Missile Command); in another, Battle Creek, Michigan, and Washington, D.C. (Office of Civil Defense). Moreover, there is nothing in the statute which permits such an arbitrary narrowing of the scope of the proviso.

3) As a further deviation from the statute the Civil Service Commission attempts to distinguish between transferred functions on the basis of the "identity" of functions in different locations involved in the transfer. (R. 145, 148). Again Congress made no such distinction. It must be assumed that Congress intended to give equal protection to transferred employees whether or not the functions were "really identical" (R. 148). As a perfect illustration of both the inaccuracy of this position and the inconsistency with which it is applied, we find the Commission and the Navy in 1961 in a transfer of function case now pending in the Court of Claims telling the Court in their brief: ". . . the underlying purpose of a transfer of function is to promote a greater efficiency of the Government Service by placing together *related* functions so they can operate in a consolidate fashion." *Colbath* v. *U. S.* No. 395-59 (Court of Claims). (In that case the government insisted a true transfer of function occurred.)

CONCLUSION

The Federation earnestly represents to this Court that the confusion and complexity in this area, which strains comprehension, is a direct result of ad hoc decisions made in the absence of any common understanding of the purpose and meaning of the third proviso of Sec. 12. It is now nineteen years since the passage of the Veterans Preference Act of 1944 and delay in settling this issue will result in loss of statutory rights, increase in litigation, and the inevitable demoralization resulting from continued uncertainty.

For these reasons Amicus requests that the Petition for Certiorari be granted.

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